Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	:	CC Docket No. 01-92
	:	
Developing a Unified Intercarrier	:	
Compensation Regime	:	

COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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Dated: May 23, 2005

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BACKGROUND AND INTRODUCTION

On March 3, 2005, the Federal Communications Commission (FCC) released a Further Notice of Proposed Rulemaking (FNPRM) in the above-captioned proceeding. The FCC proposes overhauling the current intercarrier compensation system, which it notes relies on varying traffic-sensitive payments among a range of carriers using different technologies under different regulatory classifications. The FCC indicates that its objective in this proceeding is to revamp the system of carrier payments to ensure efficient competition, the efficient use of networks and investment in those networks. The FCC suggests that any approach must promote universal service, which ensures affordable rates for customers in rural and high-cost areas. The FCC stated that it would be interested in any plan that offers customer choices and lower rates to rural consumers. In addition, any approach must simultaneously ensure that the new rules are both technologically and competitively neutral. The FCC maintains that the current system of carrier payments must be modified since the charges rendered may not have any relationship to underlying cost for the services provided. That is, the FCC believes that the current outmoded system of payments should be changed since it is based on jurisdiction and regulatory classifications that are not tied to economic or technical differences among services. Consequently, the FCC requests comments on, among other things, whether it has authority to preempt States jurisdiction over intrastate access charges and how that outcome can be accomplished, whether the current compensation system for the termination calls should be modified, and whether rate restructuring should be revenue neutral though increases to end user rates and/or universal service funding.

The Public Utilities Commission of Ohio (Ohio Commission) hereby submits its responses and recommendations to the FCC's March 3, 2005 invitation for public input in CC Docket No. 01-92.

DISCUSSION

I. STATE AUTHORITY OVER INTRASTATE ACCESS CHARGES

A. In reforming carrier compensation, the FCC should preserve State commission authority over intrastate access charges

In the FNPRM, the FCC acknowledges that "any unified regime requires reform of intrastate access charges, *which are subject to state jurisdiction*." FNPRM at ¶63 (emphasis added). But the FNPRM goes on to suggest that the FCC might have authority to supplant state jurisdiction over intrastate access charges by establishing an alternative mechanism. FNPRM at ¶79. The FCC also asks whether the "mixed use" doctrine could justify preemption of State commission authority over intrastate access charges based on the uncertainty of a customer's location where that customer is using IP-based services. FNPRM at ¶80.

The Ohio Commission does not believe that the FCC has the requisite authority to lawfully displace state jurisdiction over intrastate access charges. When reviewing the 1996 Act and the Communications Act as a whole, it is certainly not apparent that Congress intended any such result. Further, it is untimely for the FCC, after nearly a decade of implementing the 1996 Act, to entertain a fundamentally different and novel interpretation that changes the entire scope of the Act's local competition provisions. Doing so would require a holistic re-thinking of universal service policies – something the FCC may not presently be equipped to do in this docket.

Even if the FCC concludes that it possesses the authority to preempt State commissions concerning intrastate access charges, the FCC must not decide to radically change the carrier compensation system without simultaneously resolving the impact of such reform on carriers and customers and the resulting problems that will immediately be faced by State regulators. Thus, after addressing the legal/jurisdictional arguments, the PUCO expounds below on its substantive policy recommendations concerning the major issues presented in this docket. Those recommendations are intended primarily for use in implementing interstate access charge reform but could alternatively be considered in the context of developing a unified compensation system should the FCC reject Ohio's jurisdictional position.

1. State authority over intrastate access charges is preserved by the 1996 Act

Since the 1996 Act was passed, the FCC consistently recognized the limited scope of the 1996 Act amendments relative to State commission jurisdiction over intrastate services. From the very first FNPRM implementing the 1996 Act, the FCC offered the following assurance to States regarding the jurisdictional reservation found in Section 152(b):

> We note that *Sections 251 and 252 do not alter the jurisdictional division of authority with respect to matters falling outside the scope of these provisions.* For example, rates charged to end users for local exchange service, which have traditionally been subject to state authority, continue to be subject to state authority.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC

Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182 (rel. April 19, 1996), 11 FCC Rcd. 14,171 at ¶ 40 (emphasis added; footnote omitted). Hence, the FCC has already acknowledged that Congress' 70-year old jurisdictional reservation of State commission authority over intrastate communication services, found in 47 U.S.C. §152(b), still applies to matters not covered by Section 251.

More importantly, the United States Supreme Court has definitively concluded that the original design of dual jurisdiction over telephone services found in the Communications Act of 1934 survives the 1996 Act amendments. The high Court rejected the notion that Section 152(b) has become a nullity and, instead, reinforced its vitality:

> After the 1996 Act, §152(b) may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from States' *exclusive* control. Insofar as Congress has remained silent, however, § 152(b) continues to function. The Commission could not, for example, regulate *any aspect of intrastate communication not governed by the 1996 Act* on the theory that it had ancillary effect on matters within the Commission's primary jurisdiction.

AT&T v. Iowa Utilities Board, 525 U.S. 366, 381 (note 8) (1999) (emphasis added). Consequently, it is already settled law that the FCC *simply cannot preempt State authority* concerning areas not granted exclusively to the FCC by the 1996 Act.

Likewise, the "mixed use" doctrine does not support FCC preemption of State intrastate access charge authority. Preemption on this basis is only permitted only when there are both interstate and intrastate aspects of a single service and where those aspects cannot be separated. *See e.g. Public Service Comm. v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990). It cannot be reasonably concluded after decades of separation that interstate and intrastate access services have suddenly become inseparable. The two examples offered in ¶ 80, cellular and IP-based traffic, do not support a finding of impossibility.

Whether IP-based services are ultimately upheld as being interstate in nature and subject to exclusive regulation by the FCC will be determined outside the context of this docket. Carrier compensation for VoIP traffic is but one of the serious questions posed concerning the provision of VoIP that is connected through the Public Switched Telephone Network (PSTN). The FCC may end up creating a separate rule for IP-based traffic, especially if it is determined to be an information service –something that is unquestionably beyond the scope of § 251(b)(5) and § 251 generally. Likewise, given the FCC's rate authority over cellular services, it may have to create a special set of rules for that traffic.

Regardless of the outcome of those matters, there is no factual or legal basis to "bootstrap" those problems into a general observation that wireline communications cannot be separated for purposes of interstate and intrastate carrier compensation. As long as telephone numbers are used to connect calls, there simply is no basis to generally conclude that the jurisdictional separations process has suddenly become impossible for purposes of applying interstate and intrastate access charges to wireline communications. Thus, the jurisdictional separations question posed in the FNPRM does not support preemption.

Indeed, concluding that Congress intended to displace State authority over intrastate access charges would contravene not just § 152(b)'s dual jurisdictional design that preserves state intrastate authority, but would violate several other provisions of the Act. As a threshold matter, the 1996 Act amendments define "State commission" as the state agency that "has regulatory jurisdiction with respect to intrastate operations of carriers." 47 U.S.C. § 152(41) (West

2005). Thus, Congress acknowledged directly that State commissions would continue to have intrastate jurisdiction under the 1996 Act amendments.

Other provisions within the Act also consistently uphold and re-affirm the fact that the FCC has jurisdiction over interstate services and State commissions continue to exercise jurisdiction over intrastate services under the 1996 Act. *See e.g.* 47 U.S.C. § 214(e)(3) (West 2005) (divides duties between the Commission with respect to interstate services and a State commission with respect to intrastate services); 47 U.S.C. § 254(f), (g) (West 2005) (same); 47 U.S.C. § 410 (West 2005) (separation of intrastate and interstate jurisdiction and operation of joint boards for the purpose of regulatory comity and cooperation). Congress was also careful to preserve State authority, through inclusion of several "savings" provisions within the 1996 Act.

Section 251(d)(3) is entitled "Preservation of State Access Regulations" and it precludes the FCC from blocking enforcement of any regulation, order, or policy of a State commission that establishes access and interconnection obligations for LECs, is consistent with the requirements of the section and does not substantially prevent its implementation. 47 U.S.C. § 251(d)(3) (West 2005). That section is clearly instructive and applicable to intrastate access charges. Likewise, § 253(b) preserves State regulatory authority to impose requirements necessary to preserve and advance universal service (a consideration highly pertinent to access charge reform) or to protect the public safety and welfare (also pertinent). 47 U.S.C. § 253(b) (West 2005). A similar example is found in § 261(c), where Congress reiterated that nothing "precludes a State from imposing requirements on a telecommunications carrier for *intrastate* services that are necessary to further in the provision of telephone exchange service or *exchange access*," consistent with the Act. 47 U.S.C. § 261 (West 2005) (emphasis added).

Separate and apart from those specific statutory manifestations of Congressional intent to preserve State authority over intrastate communications (including intrastate access charges), the Supreme Court has generally established a special requirement of showing clear Congressional intent where pre-emption touches an area traditionally regulated by States. When Congress legislates in a field that the States have traditionally occupied, the Court must assume that the historic police powers of the States were not to be superseded by the Federal Act, unless that was the clear and manifest purpose of Congress. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 121 S. Ct. 2404, 2414, 150 L.Ed.2d 532 (2001); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L.Ed. 1447 (1947). It has long been settled that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365-366, 109 S. Ct. 2506, 2517, 105 L.Ed.2d 298 (1989) (and cases cited therein). This presumption against pre-emption of State police power regulation results in a narrow reading of even an expressly *pre-emptive* provision. This narrow inquiry is particularly appropriate in light of the multiple savings clauses found in the 1996 Act that are applicable to intrastate access charges. 47 U.S.C. §§ 251(d)(3), 253(b), 261(c) and 601(c)(1) (uncodified) (West 2005).

Congress knows how to expressly preempt intrastate authority when it wants to do so. For example, § 332(c)(3) preempts State "authority to regulate the entry of or the rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3) (West 2005). On another topic, Congress enacted § 276 as part of the 1996 Act and decided to override the dual jurisdictional design relative to payphone services by expressly authorizing the FCC to regulate payphone line rates even though they would otherwise be considered an intrastate service. 47 U.S.C. § 276

(West 2005). Congress knows how to override § 152(b) but it simply has not done so relative to intrastate access charges.

The D.C. Circuit has recently explained in a similar context the post-*AT&T* legal standard for over-riding § 152(b):

> While the apportionment of regulatory power in this dual system is, of course, subject to revision, whether the Commission may preempt state regulation of intrastate telephone service depends, as in "any pre-emption analysis," on "whether Congress intended that federal regulation supersede state law." The "best way" to answer that question, the Supreme Court has instructed, "is to examine the nature and scope of the authority granted by Congress to the agency." In cases involving the Communications Act, that inquiry is guided by the language of section 152(b), which the Supreme Court has interpreted as "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."

New England Pub. Comm. Council v. FCC, 334 F.3d 69, 75 (D.C. Cir. 2003) (citations omitted). Applying this standard, the D.C. Circuit has held that the statutory basis must be "so unambiguous or straightforward so as to override the command of § 152(b)." *Illinois Pub. Telecomms. Ass'n*., 117 F.3d 555, 561 (D.C. Cir. 1997). Far from unambiguously supporting preemption, all of the several statutory provisions discussed above would be betrayed if the FCC attempts to categorically preempt intrastate authority over access charges. In short, there is no plausible basis for the FCC to attempt a broad-based preemption of State commission authority concerning intrastate access services.

2. Section 251(g) does not justify broad preemption of intrastate access charges

The FCC references ICF's position that § 251(g) of the 1996 Act supports preemption of State authority over intrastate access charges. FNPRM at ¶ 82. Because of the unique nature of this provision, it is being addressed separately. But, consistent with the above discussion of the 1996 Act provisions, the Ohio Commission submits that § 251(g) also fails to provide an adequate basis for preemption of State authority over intrastate access charges.

The FCC itself, in the *ISP Remand Order*, has directly concluded that, under § 251(g), the listed access services "remain subject to Commission jurisdiction under Section 201 (or, to the extent they are *intrastate* services, they remain subject to the jurisdiction of state commissions) . . ." *ISP Remand Order* at ¶39. The *ISP Remand Order* went on to emphasize that § 251(g) was expressly limited to interstate access requirements:

> By its express terms, of course, section 251(g) permits the Commission to supersede pre-Act requirements for *interstate* access services. Therefore the Commission may make an affirmative determination to adopt rules that subject such traffic to obligations different that those that existed pre-Act. For example, consistent with that authority, the Commission has previously made the affirmative determination that certain categories of *interstate* access traffic should be subject to section 251(c)(4).

ISP Remand Order at ¶ 41 (emphasis added). Even beyond those crystal clear statements, the FCC again explicitly reiterated that § 251(g) does not directly govern intrastate access regimes that the statute "expressly preserves only *the Commission's* traditional policies and authority over *interstate* access services." *ISP Remand Order* at ¶ 37 (note 66).

Although the D.C. Circuit reversed the *ISP Remand Order*'s conclusion that § 251(g) categorically exempted ISP-bound traffic from reciprocal compensation under § 251(b)(5), the Court did not disturb the FCC's findings relative to the interstate scope of § 251(g). *Worldcom v. FCC*, 288 F.3d 429 (2002 D.C. Cir.). Rather, *Worldcom* simply reversed the FCC's reliance on § 251(g) as authority to carve out ISP-bound traffic from reciprocal compensation requirements because: (1) there was no pre-Act obligation relating to intercarrier compensation for ISP-bound traffic and § 251(g) was simply "a transitional device preserving various LEC duties that antedated the 1996 Act;" and (2) § 251(g) only applies to services provided to IXCs and ISPs, so it does not apply to LECs' services to other LECs. *Worldcom*, 288 F.3d at 430, 433-434. The *Worldcom* Court understood and expressly referenced the fact that the *ISP Remand Order*'s interpretation of § 251(g) involves the FCC's "general authority to regulate the rates and terms in interstate telecommunications services…" *Worldcom*, 288 F.3d at 432. But the *ISP Remand Order*'s emphatic distinction between interstate and intrastate access regimes was left undisturbed and, indeed, the compensation scheme created by the *ISP Remand Order* (applicable to ISP traffic on the basis that it is interstate in nature) was itself left in tact.

ICF's reliance on the *ISP Remand Order* to support preemption of intrastate access jurisdiction is not only misplaced, but that position is severely undercut by the *ISP Remand Order* itself. Moreover, the Supreme Court has declined to characterize § 251(g) as a statute that confers authority upon the FCC. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 382 (1999). Indeed, the Court explicitly referred to subsection (g) and other provisions within § 251 as being "not grants of authority at all." *AT&T*, 525 U.S. at 383.

Finally regarding § 251(g), a related provision, § 601 of the 1996 Act (uncodified), states that the 1996 Act "shall not be construed to modify, impair or supersede Federal, State or local law unless *expressly* so provided." Pub. L. No. 104-104 §601(c)(1), 110 Stat. 56 (1996), 47 U.S.C. §152 note (emphasis added). Section 601 is appended to § 152(b), the provision that preserves State jurisdiction over intrastate communications, and directly involves application of the AT&T consent decree in concert with the enactment § 251(g). Those two provisions are inextricably linked and work in tandem. Thus, in the same context of examining the scope of §

251(g) and 152(b), Congress has strongly reinforced its intent that the 1996 Act (and the entire Communications Act) should be interpreted to preempt the intrastate authority of State commissions only where Congress itself has expressly done so.

B. The FCC must address the continuing State role and the impact on universal service and local rates

Re-interpreting Section 251(b)(5) to include toll traffic now would require overhaul of major policies under the 1996 Act including the so-called "trilogy" orders –<u>before</u> 251(b)(5) is re-interpreted and re-implemented. Those policies have been implemented for years and constitute the underpinnings of the FCC's implementation of the 1996 Act and all of those policies were designed based on the assumption that 251(b)(5) applies only to local traffic. At a minimum, the implementation of sweeping access charge reforms mandates a comprehensive and simultaneous review of universal service policies, given that those policies are inextricably linked to access charge policy and will be significantly impacted by such changes.

There must remain a significant role for State commissions even if the FCC establishes a unified compensation regime applicable to both interstate and intrastate traffic. As the United States Supreme Court has forcefully observed, the 1996 Act is "a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the *policy implications* of that extension *to be determined by state commissions*, which – *within the broad range of lawful policymaking* left open to administrative agencies – are *beyond federal control*." *AT&T*, 525 U.S. at 385 (emphasis added). Thus, even where the 1996 Act extends into intrastate communications, a distinct role remains for State commissions to apply and implement FCC guidelines, within a *broad range* of lawful policymaking, to establish rates and mediate or arbitrate interconnection agreements, etc. The FCC cannot have it both ways and conclude that access traffic is within § 251 but somehow it is outside the scope of § 252's State-driven processes.

As a related matter, the impact of any unified compensation policy on retail rates for local service (a matter that is indisputably within the exclusive control of States) would be both unavoidable and substantial. That fact alone should be reason enough for the FCC to not only proceed with caution but with a great deal of cooperation, sensitivity and support for the difficult position in which the FCC's new policy would be placing State commissions. If true reform is to be accomplished, none of the key problems can be ignored; rather, all of them, including reform of the existing Universal Service Fund, must be tackled head on.

In sum, although there may be some practical arguments that could support a broad-based federal policy concerning unified carrier compensation, existing legal constraints prevent the FCC from taking an approach that attempts to holistically exclude State authority. And even from a policy (*i.e.*, non-legal) viewpoint, considerations of uniformity do not alone justify a one-size-fits-all approach to carrier compensation. The FCC's approach in this docket must acknowledge the important relationship between intrastate access charges, local rates and universal service policies. The Ohio Commission urges caution when considering these sweeping carrier compensation reforms and suggests that the FCC cannot adopt any unified compensation system without simultaneously reforming its universal service policies to address the impact of such carrier compensation reform.

II. POLICY RECOMMENDATIONS

A. Technology Neutral Compensation

The FCC found that, due to development in the telecommunications market and the use of different technologies to carry communications traffic, it is compelled to move toward a new, unified intercarrier compensation regime that is better suited to a market characterized by competition among multiple types of carriers and technologies. FNPRM at ¶ 17. The Ohio Commission generally supports the FCC's finding and believes that compensation requirements should be technologically and competitively neutral (*i.e.*, apply equally to all providers exchanging traffic regardless of the network technology such as PSTN, wireless, or packet-based). But uniformity, in and of itself, should not be used as a basis for preemption of State authority; thus, the FCC should strive for being technology neutral while respecting Congress' design for dual telecommunications jurisdiction. Also, as referenced above, uniformity in compensation under § 251(b)(5) may not be feasible for other reasons; for example, if the FCC determines that IP-enabled services are not telecommunications services, those services will be beyond the scope of § 251.

B. Network Interconnection

Under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point. The FCC has interpreted this provision to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA. The FCC seeks comment on whether changes to its network interconnection rules are needed to be consistent with changes to the existing intercarrier compensation regimes. FNPRM at ¶¶ 92-97.

The Ohio Commission submits that the FCC should require a minimum of one POI per LATA (*i.e.*, retain the existing interconnection requirement including meet-point arrangements) as a general default rule, but require additional point(s) of interconnection as traffic to specific switching/routing point(s) within the LATA exceeds certain capacity threshold (for example, DS1). This will serve to preserve the existing network resources. There are numerous interconnection agreements filed with the Ohio Commission which include negotiated terms and conditions for establishment of additional POIs based on traffic threshold criteria. The Ohio Commission believes that carriers/network providers should retain the ability to negotiate a mutually agreed upon location of the POI as well as other details regarding the establishment of interconnection facilities. Existing interconnection requirements allow efficient interconnection arrangements without the need to duplicate the incumbent LEC network.

The FCC also seeks comment on proposals to change interconnection rules using the "edges" concept. FNPRM at ¶ 92. These proposals establish default technical and financial rules that generally require an originating carrier to deliver traffic to the "edge" of a terminating carrier's network. The Ohio Commission believes that the "edges" concept of interconnection proposed in this proceeding should be rejected as it would require the construction of additional, and, possibly, unneeded interconnection facilities by all carriers.

The FCC also sought comment on whether an incumbent LEC should be obligated to bear its own costs of delivering traffic to a single POI when that POI is located outside the calling party's local calling area. FNPRM at ¶87. The Ohio Commission believes that under its recommendation – which is that an incumbent LEC should be allowed to negotiate POI location with an interconnecting entity – the ability to add POI(s) as traffic flows increase will, by design, minimize the incumbent LEC's own costs. Also, now that the RBOCs have received InterLATA relief under § 271, all incumbent LECs are able to offer bundles of local and long distance services. Thus, an incumbent LEC should be able to recover its own costs of delivering traffic to a single POI from the price of bundled services without necessarily increasing rates for stand-alone local services.

As to the impact of our recommended interconnection rule on small incumbent LECs, the Ohio Commission notes that competitive LECs as well as CMRS providers typically indirectly interconnect with small incumbent LECs (*i.e.*, they establish interconnection with large incumbent LECs and send their traffic to the small incumbent LECs through the large incumbent LEC's tandem). In that context, the LEC's or CMRS provider's choice dictates the POI location without any input or choice from the small incumbent LEC. Accordingly, the Ohio Commission recommends that the FCC require competitive LECs, CMRS providers, and packet-based network providers to establish interconnection arrangements for the transport and termination of traffic with small incumbent LECs before sending traffic to them for termination. Additionally, once traffic volumes exceed a certain threshold, interconnecting entities (competitive LECs, CMRS providers, and packet-based network providers) should be required to establish direct interconnection with small incumbent LECs. However, as discussed in detail in the Transit Traffic section of our comments, interconnecting entities should be required to establish compensation arrangements for the traffic they exchange with the small incumbent LECs regardless of the location of point of interconnection.

C. Compensation Arrangements

The FCC states that "Developments in the ability of consumers to manage their own telecommunications services undermine the premise that the calling party is the sole cost causer." FNPRM at ¶ 17. As part of the support for this idea, the FCC cites the availability and popularity of such services as caller ID, privacy messages and non-solicitation messages. The FCC also cites the availability of IP-enabled services which give consumers greater control over which calls they may choose to receive, as well as the existence of the Do-Not-Call list. The FCC concludes that the availability of these services indicates that customers find economic value in receiving those calls they do choose to take. FNPRM at ¶¶ 25, 26 and 27.

The Ohio Commission believes that the current ability of consumers to avoid unwanted calls, while still getting those calls they do value, still lags far behind the capability to make calls. Rather, the desire for and popularity of the above-referenced services indicates the opposite of the FCC's conclusion; customers are already paying their observed economic value in receiving calls "from all comers" (by virtue of obtaining service) and are in fact willing to pay more only to avoid certain calls. The Ohio Commission further observes that, contrary to the FCC's assumption, not every customer subscribes to Caller ID. Moreover, voice mail and answering machines will answer a call even if it is unwanted. The Ohio Commission further remarks that registering with the FCC and FTC's Do-Not-Call List does not preclude all unwanted calls. Specifically, even where the Do-Not-Call requirements are followed, the Do-Not-Call List does not prevent unwanted calls from political candidates, unwanted calls from charities, and unwanted calls from companies with whom the customer has had a previous business relationship. The unalterable fact remains that it is the caller who makes the decision to initiate the call, and thereby place a demand on the network.

The Ohio Commission believes that a Calling Party Number Pays (CPNP) regime does a better job of assigning costs directly to the decision-maker than the bill-and-keep regime. The current situation with the Internet and e-mail serves as a vivid example of the cost assignment problems in a network due to a retail pricing structure that provides consumers with little to no indication of the real cost underlying initiation of a message. The Internet operates on the principle that every party bears its own costs of connecting to and utilizing the network. Looking at e-mail, one finds a great deal of the available bandwidth taken up by unsolicited commercial e-mail (or "spam"), scams, fraud, and malicious software, that both congest the system and decrease its value for all concerned. Companies spend millions of dollars every year trying to prevent the delivery of unwanted messages to their customers and employees, without complete success. Interestingly, the solution that is increasingly being posited is having the sender of e-mail bear the cost of the network, or some proxy thereof. That solution simply reflects an attempt to place the economic cost signal where it belongs, which is to the one making the economic decision to initiate a communication. The FCC should not now be moving the telecommunications network in the opposite direction.

The Ohio Commission submits that cost-based compensation founded on the CPNP for cost recovery is superior to a bill-and-keep regime. The Ohio Commission believes that as interconnecting network providers engage in negotiating location and the number of POI(s), cost-based compensation arrangements will offer incentives for efficient use of the network resources and eliminate cross-subsidization between competitive carriers. Under a bill-and-keep regime, carriers would attempt to game the system by shifting the cost of transporting traffic to providers of other networks while minimizing investment on their respective network, as they would have no assurance that their investments will ever be recovered. By contrast, if network providers can be assured cost recovery for carrying traffic, an incentive for building, upgrading and maintaining their networks, whether rural or urban, would exist. The benefits of such investment ultimately flow to all consumers of all network providers regardless of technologies used.

The Ohio Commission submits that any unified compensation regime that does not allow for mutual and reciprocal recovery by each carrier for its cost on the basis of "additional costs" of terminating a call is not consistent with Section 252(d)(2) requirement, especially where the exchange of traffic is not balanced between the carriers. Cost-based compensation based on the CPNP regime provides fair compensation to all network providers and always satisfies the statutory pricing standard (*i.e.*, "additional cost") under section 252(d)(2)(A), even when traffic is not in balance between carriers. Although § 252(d)(2)(B)(i) ensures that a bill-and-keep arrangement that is agreed to among the involved carriers is not legally precluded where the carriers "waive mutual recovery," that section cannot be used to validate bill-and-keep as a unified compensation regime. If anything, the fact that § 252(d)(2)(B)(i) only allows for bill-and-keep where such mutual waiver occurs among affected carriers supports the notion that bill-and-keep is not otherwise permitted (*i.e.*, under a mandatory unified compensation regime). Under a bill-and-keep regime, providers of ubiquitous network infrastructure would bear a disproportionate revenue shortfall compared to providers with limited network infrastructure. With this disproportionate revenue shortfall comes a competitive disadvantage, regardless of a cost recovery method for such shortfall.

It is also true that reducing existing access rates to cost-based compensation based on the CPNP regime, rather than a bill-and-keep regime, will minimize potential revenue shock, (which would need to be addressed separately as a revenue shortfall issue). In turn, this will lessen the pressure on universal service funding as well as the potential need to increase end-user charges. The FCC expressed concern that, absent some further reform of the access charge regime, rate averaging and rate integration requirements eventually will have the effect of discouraging IXCs from serving rural areas. FNPRM at ¶ 86. The Ohio Commission strongly believes that the adoption of cost-based compensation rates based on the CPNP regime will serve to alleviate concerns about IXC competition in rural areas. The CPNP regime will provide an incentive to IXCs to market their services in rural areas and to comply with rate averaging and rate integration requirements.

In response to issues raised by the FCC in paragraphs 66-73 of the FNPRM, the Ohio Commission believes that compensation arrangements should recover only traffic-sensitive costs of the network and should apply similarly to comparable components (*i.e.*, performing comparable functions) of different networks no matter the technology used. This means that compensation arrangements should only recover traffic-sensitive costs of the PSTN, wireless and packet-based networks. Traffic-sensitive costs should be defined as costs for a portion of the network that vary with the usage of the network. Also, to the extent possible, rate structures should be similar for comparable components of different networks using different technologies. The traffic-sensitive components of different network technologies (PSTN, wireless and packet-based) and different network architectures (incumbent LECs vs. competitive LECs) that are subject to compensation must be more precisely identified upfront. Such cost-based compensation rates should be based on individual carrier's costs to satisfy statutory requirements in section 252(d)(2). If, through a cost study, it can be demonstrated that the carrier's traffic-sensitive costs (or cost components) for its specific network are higher than the costs for comparable components of other networks, then that carrier should be allowed to charge higher rates for comparable functions of other networks. If a carrier (small LEC, CLEC, CMRS or provider using packet-based network) is not able to conduct a cost study, it should have the option of mirroring the rates of the carrier that it exchanges traffic with, subject to restriction of comparable functionality.

The Ohio Commission recommends that the FCC should implement a rate structure that is based on bandwidth for "transport" facilities and on a flat-rate per port (line) for "termination" (switching/routing) functionality for all network technologies. Due to the increasing amount of packet switched and broadband traffic, the Ohio Commission would recommend that the flat-rated, per port (line) charge be based on the line capacity (*i.e.*, DS1 port, DS3 port, etc.). As to the methodology to determine the "cost", the Ohio Commission recommends the use of the TELRIC standard for setting intercarrier compensation rates.

The Ohio Commission believes that industry familiarity with the TELRIC standard will provide a level of certainty to all participants. Creating a new incremental costing standard, by contrast, would cause additional delay, regulatory uncertainty and more litigation. TELRIC is established, well-developed and has already been approved as being lawful by the Supreme Court.

D. Cost Recovery - Interstate Rate of Return Carriers

The FCC seeks comment on the extent to which it should give rate-of-return LECs the opportunity to offset lost access charge revenues with additional universal service funding, additional subscriber charges, or some combination of the two. The FCC further questions whether it should eliminate subscriber line charge (SLC) rate caps. The FCC requests parties to make specific proposals as to how any additional end-user charges should be calculated. If additional universal service support is necessary, the FCC seeks comment on how much additional support should be furnished and how such support should be distributed. The FCC also questions to what extent rate-of-return carriers should be required to demonstrate that they are unable to recover their interstate-allocated costs from other sources before they are authorized any additional universal service funding. The FCC seeks comments on whether it should create a federal mechanism to offset any lost intrastate revenues or whether the States should be responsible for establishing alternative cost recovery mechanisms for LECs within the intrastate jurisdiction. FNPRM at ¶¶ 107-113.

As mentioned earlier in these comments, the Ohio Commission questions whether the FCC holds authority to preempt States' jurisdiction over intrastate access charges. These comments concerning intrastate access charge restructurings are being offered to address what will be needed should the FCC preempt State jurisdiction. In that context, the Ohio Commission maintains that any remaining intrastate carrier common line charges (CCLCs) should be restructured to retail local service charges on a revenue-neutral basis (subject to audit by the State commission).

Carriers subject to interstate rate-of-return regulation for access should be required to demonstrate the need for any revenue replacement beyond the CCLC to the satisfaction of the State commission. The Ohio Commission notes that, as the FCC is aware, limiting end user local service increases to only restructured CCLCs is consistent with the FCC's previous decisions in CC Docket No. 96-262 regarding the Coalition for Affordable Local and Long Distance Services (CALLS) petition to restructure price cap carriers' access charges. Moreover, this proposal is generally consistent with the FCC's decision regarding the Multi-Association Group's (MAG's) proposal to restructure interstate rate-of-return carriers' access charges to end user charges (CC Docket No. 00-256).

The Ohio Commission maintains that the States are best positioned to determine to what extent, if any, federal rate-of-return carriers should be permitted to restructure traffic sensitive access rates to retail rates. Therefore, the FCC should require ILECs to petition the State commission to implement any rate restructurings (including interstate traffic sensitive access charges) that result in rate increases to end users. The Ohio Commission observes that adopting this recommendation would mitigate the need to maintain jurisdictional separations for those States that elect to perform this comprehensive review of proposed traffic sensitive restructurings since, except for the interstate SLCs, States would be responsible to determine the full amount of the local service rate to retail customers.

E. The Need for Comprehensive Universal Service Programs Funding Reform

The Ohio Commission submits that, if the FCC makes wholesale revisions to the intercarrier compensation regime, then corresponding comprehensive enhancements and modifications to the universal service funding programs must occur at the same time. Specifically, the FCC should not guarantee that rate-of-return carriers will be kept whole through existing or increased USF assistance relating to access restructurings adopted in this proceeding. The Ohio Commission maintains that such federal USF funding should be available to only rate-of-return incumbent carriers. Whatever else the FCC determines in this regard, it must address and resolve the impact of access charge reforms on the universal service fund and related issues at the same time the access charge reforms are implemented (as discussed in Section I.B. above).

F. Cost Recovery -Price Cap LECs

The FCC inquires as to whether it is obligated to provide alternative cost recovery mechanisms to ILECs that are subject to interstate price caps regulation. The FCC questions whether such price cap carriers should be required to demonstrate that they will be unable to recover their switching and transport costs from other sources before we establish such mechanisms and whether any new compensation regime should be revenue neutral for the affected carriers. The FCC further questions whether it should rely solely on end-user charges, or whether it also should rely on universal service support mechanisms (new or existing) to offset revenues no longer recovered through interstate access charges. The FCC also inquires whether there is sufficient competition in the marketplace to allow the elimination of SLC caps and permit price cap LECs to charge end users whatever the market will bear. The FCC invites comment on whether such a finding precludes the need for any additional universal service funding for price cap carriers. FNPRM at ¶¶ 98-106.

The Ohio Commission maintains that traffic-sensitive rate reductions (in addition to any other revenue dislocations for decisions in this proceeding) should be borne in their entirety by interstate price cap ILECs, unless a carrier can demonstrate need to its State commission and show that the net effect on revenues cannot be recovered from other sources. The Ohio Commission believes that the States are better situated to determine whether price cap carriers should be permitted to increase local service rates to recover from Ohio customers decreased cash flow associated with access pricing reductions. The Ohio Commission suspects that replacement funding for price cap carriers may not be necessary for several reasons. First, consistent with our TELRIC pricing proposal, the Ohio Commission expects that the difference between the CALLS rate for price cap carriers and TELRIC would be relatively small. Second, price cap carriers are likely to enjoy a net reduction of existing costs based on reduced access charges paid to terminate their traffic on networks of non-price cap LECs. Thus, prior to granting any rate relief, carriers should be required to quantify the extent to which the FCC unified carrier compensation decision will result in net revenue reductions. Finally, we note that since the late 1980s, price cap carriers have traditionally absorbed the decreases associated with traffic sensitive price reductions through the X-factor in the price caps formula. We believe that there has been no compelling argument made that should convince the FCC to amend its policies.

Regarding the FCC's request for comment concerning the removal of SLC caps, the Ohio Commission maintains that it is premature to eliminate this important safeguard. That is, revenue neutral SLC caps should be imposed. Because most carriers offer both local and long distance services, *the removal of SLC caps would be tantamount to local rate deregulation*. As such, the removal of SLC caps should occur only after a carrier makes a demonstration of pervasive levels of competition. Moreover, this demonstration must be made and approved at the state level. Once a SLC cap is eliminated because there are abundant competitive alternatives, the FCC may want to explore via a supplemental NPRM whether continued need for USF support is warranted.

The FCC requests comment on whether any amendments should be made to its Lifeline services program to accommodate regulatory changes effectuated in this proceeding. NPRM at ¶ 106. The Ohio Commission maintains that, to the extent States' access rates are preemptively decreased, resulting in corresponding local rate increases, additional commensurate federal Lifeline assistance should be made to low-income customers.

The FCC requests comment on the amount of universal service funding that would be required if any modification to the current access charge regime is adopted. The FCC asks that commenters address competitive neutrality of any newly proposed universal service mechanism with respect to competitive eligible telecommunications carriers. FNPRM at ¶ 110.

To limit demands on the USF, the Ohio Commission recommends that support be made available only to those carriers that are willing to act as a carrier-of-last resort for the provision of basic telephone service, in that they are willing to provide service ubiquitously throughout an entire predefined service area or study area as determined by the FCC (*e.g.*, a wire center, exchange, etc.). In addition, to ensure adequate funding of USF programs, the Ohio Commission maintains that all network providers interconnecting with the PSTN must contribute to the USF. The list of providers that should be required to contribute to the fund includes: ILECs, CLECs, IXCs, CMRS providers, and providers of IP-enabled services interconnecting with the PSTN.

Regarding the issue of USF support contributions, in light of the FCC's proposals to significantly reduce both intrastate and interstate access rates, the Ohio Commission observes that, depending on the outcome of the FCC decision, it may be necessary for State commissions to establish intrastate universal service support to supplant access charge revenue decreases. Therefore, the FCC should be mindful not to impose telephone number-based USF support assessments that would ultimately be billed to end user retail customers. As mentioned in our May 10, 2002 comments to the FCC in CC Docket No. 96-45, such a determination would result in end users supporting two programs while simultaneously ensuring that IXCs (a major provider of interstate services) contribute nothing at all to the USF. As an alternative to end user charges, the FCC should apply its safe harbor assessment for CMRS providers to all carriers whose interstate usage cannot be measured (*i.e.*, providers of IP-enabled services interconnecting with the PSTN).

G. Implementation

The FCC requests comment on, if it possesses the legal authority to reduce or eliminate intrastate access charges, should intrastate access charges be reduced or eliminated on the same schedule as interstate access charges, or would it be better to give States more flexibility in light of the role they historically have played in addressing these issues. The FCC notes that commenters also should address whether there are any adverse consequences associated with transitioning rate-of-return LECs toward a unified regime at a slower pace than price cap LECs. FNPRM at ¶¶ 116 -119.

Since the Ohio Commission has mirrored the FCC's access reductions and restructurings adopted in CC Docket No. 96-262 regarding CALLS, implementation of any additional mirrored restructuring for Ohio's four largest ILECs (SBC, Verizon, Cincinnati Bell, and Sprint) could occur in a relatively timely manner, particularly if the FCC adopts Ohio's proposal for cost-based pricing. The Ohio Commission believes that implementation of these rates could occur within a reasonably short time frame (12-18 months).

Regarding Ohio's carriers subject to interstate rate-of-return regulation, the Ohio Commission recommends that the FCC allow three years to implement any necessary intrastate CCLC restructurings. The Ohio Commission observes that intrastate CCLCs for some carriers in Ohio are currently capped at the level established by the FCC in 1987 (*i.e.*, those carriers classified by the FCC for purposes of interstate regulation as rate-of-return carriers). Therefore, a three-year period is necessary to verify the accuracy of the proposed restructured rates and to implement any rate adjustments that are necessary –but doing so over a period of time so to mitigate rate shock to end user retail customers. Concerning rate-of-return carrier intrastate traffic sensitive rate restructurings, the Ohio Commission submits that it would take a minimum of five years and a maximum of seven years to review and potentially restructure these charges depending on each individual carrier's needs. The state of Ohio has 34 ILECs with traffic sensitive access charges capped at 1995 federal levels and it would take this amount of time to adequately and thoroughly review and implement applications for restructuring

H. Additional Issues

1. Transit Traffic Issues

Transit traffic occurs when two carriers that are not directly interconnected exchange traffic by routing the traffic through a third carrier, also known as an intermediate carrier. The FCC states that the availability of transit service is increasingly critical but that it has not had the occasion to determine, through its current intercarrier compensation rules, whether carriers have a duty to provide transit traffic. According to the FCC, however, the Act appears to require transit as a form of indirect interconnection. The FCC inquires as to what statutory obligation would require transit traffic; how a bill-and-keep regime might affect such calls; the need for standard terms and conditions; the appropriate pricing and the need for detailed billing for such traffic. FNPRM at ¶¶120-130.

As early as 1997, in the Ohio Commission's Local Service Guidelines, the Ohio Commission first addressed the applicability of transit traffic to intermediate carriers.[1] These guidelines required that the intermediate LEC carrying traffic originating and terminating on other carriers' network would be compensated for the use of its network facilities to complete the call. In addition, some of the Ohio Commission's first arbitration awards further clarified that, consistent with the FCC's current proposal, transit traffic is required under the Act as "indirect" interconnection pursuant to 251(c)(2)(b).[2] The Ohio Commission advocates that transit traffic be provided through a cost-based rate consistent with other sections of these comments. The Ohio Commission also proposes that the FCC reinforce the obligation of all telephone companies to provide transit traffic as long as the telephone company is appropriately compensated for the use of its network facilities. The FCC should also require that originating and terminating telephone companies have a compensation agreement in place that sets the rates, terms and conditions for such traffic. Finally, the Ohio Commission points out that transit traffic highlights the difficulty of implementing a bill-and-keep regime for intercarrier compensation. Bill-and-keep would not allow for the compensation of network facilities necessary to carry the transit traffic, since the originating and terminating carrier would not exchange payments.

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1 *Ohio Local Competition Guidelines*, Case No. 95-845-TP-COI, February 20, 1997, Guideline IV.E.

2 *See MCI v. Ameritech Ohio*, Case No. 96-888-TP-ARB and *MCI v. CBT*, Case No. 97-152-TP-ARB.

The FCC next seeks comment on proposed solutions to the billing problems small or rural carriers may face when a transit traffic arrangement is established. These carriers argue that they do not always receive necessary billing information from the transit carrier in order to bill the originating carrier for the traffic the small carrier terminates. The FCC seeks comment on solutions that would mitigate the concerns of small or rural carriers. NPRM at ¶¶ 131-133.

As stated previously, the Ohio Commission believes that carriers are under an obligation to negotiate transit traffic arrangements and that such arrangements should be cost-based. To the extent that a carrier believes that a direct connection is more appropriate than an indirect connection, the Ohio Commission submits (as outlined above under the Network Interconnection section) that carriers should negotiate and, if necessary, arbitrate an interconnection arrangement for a single POI per LATA unless traffic exceeds a certain capacity threshold. The Ohio Commission notes that our staff has encountered these exact issues on numerous occasions and has been successful in providing both formal and informal resolution for carriers. Recently, the Ohio Commission staff supported the efforts of several small telephone carriers in the establishment of a shared tandem that resides at the location of one particular telephone company. Upon deployment of this tandem, the small telephone companies were able to aggregate their traffic and obtain detailed billing information. The Ohio Commission continues to believe that such solutions will continue to mitigate the concerns of all carriers regarding the exchange of transit traffic. We, therefore, support the proposal of the FCC to require cost-based, transit traffic exchange and compensation as is currently required by the Ohio Commission.

2. CMRS Issues

The FCC states that in the *Local Competition First Report and Order*, it adopted Rule 51.701(b)(2) that defines telecom traffic exchanged between a LEC and a CMRS provider as reciprocal compensation if "at the beginning of the call, the call originates and terminates within the same Major Trading Area (MTA)." According to the FCC, because wireless license territories are federally authorized and vary in size, the largest authorized wireless license territory, known as the MTA, would be the most appropriate local service area for the purpose of reciprocal compensation under section 251(b)(5) of the Act. In light of a unified regime, FCC seeks comment on whether it should eliminate the intraMTA rule and treat CMRS as all other wireline traffic for compensation purposes. The FCC notes that this solution is supported, in various forms, by several of the proposals including: ARIC, CBICC, EPG, ICF and Western Wireless. However, the FCC invites comment on the possibility that wireline local calling areas form the appropriate geographic scope for both LEC-originated and CMRS-originated reciprocal compensation calls in the absence of the intraMTA rule. NPRM at ¶134-138.

Of course, a fully unified regime would require the elimination of the existing "carve-out" of CMRS originated reciprocal compensation traffic from other LEC originated traffic through the intraMTA rule. In fact, a unified regime for the exchange of all types of traffic, where a "minute is a minute" would render the need to distinguish any telecommunications traffic, based on a geographic area or provider, moot. However, should the FCC determine that wireline local calling areas are the appropriate geographic scope for the exchange of local traffic subject to reciprocal compensation, the Ohio Commission would support this solution as being more equitable than the existing CMRS MTA rule. As the FCC recognizes, CMRS MTAs are generally much larger geographic areas than the local calling areas currently authorized by State commissions for wireline traffic.

Currently, in Ohio, CLECs are not required to mirror the local calling areas of the ILECs. However, for the purposes of intercarrier compensation, the ILEC's local calling area, including any extended area service (EAS), provides the geographic boundary for determining whether a call, originated and terminated in this area, is local and subject to reciprocal compensation.[3] This system has worked well for the compensation of CLEC and ILEC traffic since its establishment in 1997 and avoids the dialing and rating issues that the FCC recognizes is a result of carriers' disagreement regarding the applicability of the current intraMTA rule.

In addition, the FCC recognizes the problem of CMRS providers sending traffic through a large ILEC tandem to a small LEC when there is no interconnection or other compensation arrangement. The FCC proposes that it adopt national terms and rates for LEC-CMRS interconnections where traffic is "*de minimis*" or, in the alternative, the FCC proposes allowing States to establish uniform terms or master interconnection agreements for small LEC and CMRS providers. NPRM at ¶139-140.

The Ohio Commission agrees that a significant issue for small or rural LECs involves the lack of compensation for CMRS traffic sent through an ILEC tandem where no interconnection or other compensation arrangement exists for exchange of traffic between the small LEC and the CMRS. For example, in response to a recent informal staff data collection of 33 of Ohio's smallest ILECs, the companies claim that, in calendar year 2004, a total of approximately 15-20 million CMRS minutes were terminated on the small LEC networks without compensation.

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[3] *Ohio Local Competition Guidelines*, Case No. 95-845-TP-COI, February 20, 1997, Guideline IV.C.

On the other hand, the Ohio Commission has assisted small LECs in obtaining interconnection agreements with wireless carriers in Ohio on both a formal and informal basis. A review of the interconnection agreements filed at the Ohio Commission since January 1, 2000 indicates that approximately 50 agreements have been filed between Ohio's small carriers and CMRS providers with the majority filed in 2004 and 2005. It appears that several of these agreements have served, and continue to serve, as models for CMRS and small LEC negotiations in Ohio. Therefore, the Ohio Commission does not see the need for national terms and conditions or a master interconnection agreement. Again, the Ohio Commission submits (as outlined above under the Network Interconnection section) that carriers should negotiate and, if necessary, arbitrate interconnection arrangements for a single POI per LATA unless traffic exceeds a certain capacity threshold. If required, our staff can provide both formal and informal assistance to ensure fair negotiation takes place and that agreements are made and met.

Finally, the FCC discusses the rating and compensation of CMRS traffic. The FCC believes that it is standard industry practice, particularly among larger LECs, to compare the NPA/NXX code of the calling and called party to determine proper rating and compensation for the call. CMRS providers claim that this practice allows LECs to "game the system" and route a CMRS local call to an IXC so that the calling party would be billed for a toll call and the LEC can demand access payments rather than reciprocal compensation. The FCC questions whether this practice is unique to CMRS or applies to other traffic, as well. Further, the FCC recognizes that attempts to address some of the rating issues may involve preemption of State commission jurisdiction over the retail rating of intrastate calls and the definition of local calling areas. NPRM at ¶141-143.

The Ohio Commission agrees with the FCC that the existing practice of relying upon the NPA/NXX to rate calls has allowed carriers the ability to game the system by obtaining "virtual" number assignments that do not correspond to the actual geographic end points of the call. This is not a unique issue to CMRS traffic. For example, the Ohio Commission is aware of other providers using such a system so that toll calls to ISPs appear as local even when the ISP resides outside of the wireline local calling area and the provider serves no other customers within the local calling area.

Although a unified intercarrier compensation regime would eliminate the need to distinguish between local and toll calls for the purposes of compensation and would render many of these issues moot, the Ohio Commission sees no need for the FCC to preempt the Ohio Commission's jurisdiction over retail routing and local calling area definitions for intrastate calls. The Ohio Commission has successfully resolved this issue through our rules and arbitration awards. To the extent that the FCC finds it necessary to define a geographic boundary for the purposes of reciprocal compensation of local calls, the Ohio Commission agrees with the FCC that it is the historical practice of State commissions to define local calling areas by considering a number of factors including community of interest and the impact on toll revenues. The Ohio Commission is in the best position to judge these factors and we continue to believe that geographic end points of the call, based on the ILEC's wireline local calling area, rather than the NPA/NXX, should be the ultimate, determinate factor for rating and intercarrier compensation of local traffic under the current system.

CONCLUSION

The Ohio Commission wishes to thank the FCC for the opportunity to comment in this proceeding.

Respectfully submitted,

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Dated: May 23, 2005